

LPS drafting information session

April 2018

TASMANIAN PLANNING COMMISSION



“The planning scheme is very complex, and exceedingly and unnecessarily difficult to comprehend and interpret. Most ordinary people would not have a chance. Most sensible people, or people with a life, would not attempt the task unless they had absolutely no choice. In order to determine how the scheme operates in relation to the appellant’s proposed development, it is practically essential to have a law degree, decades of experience in interpreting legal documents, a talent for understanding gobbledygook and misused words, a lot of time, and a very strong capacity for perseverance.”

Justice Blow,

AAD Nominees Pty Ltd v Resource Management and Planning Appeal Tribunal [2011] TASFC 5

Session outline

Overview

Key challenge – exercise of discretion

Specific drafting issues

PPZs and SAPs; SSQs; code lists; and Applied, Adopted or Incorporated Documents

Drafting review tests and drafting consistency tests

Editorial - style and conventions

Overview – the Act

Section 32 – form and structure provided in the SPPs
'structure' of LPS [s32(5)] and 'form' of LPS provisions [s32(6)]

Schedule 6 clause 8C

Transitioning PPZs, SAPs and SSQs are permitted to have alterations

Schedule 6 clause 8D

Transitioning code applying provisions modification permitted

Overview – SPP requirements

Clause LP1.0 LPS Requirements (incl Appendix A – LPS Template)

- Local Area Objectives (LP1.3)
- PPZs (LP 1.4)
- SAPs (LP 1.5)
- SSQs (LP 1.6)
- Code Lists (LP 1.8) and Appendix A Tables C6.1 – C6.5; C8.1 and C8.1;
and Table C11.1
- Applied, Adopted & Incorporated Documents (Appendix A)

Overview - Practice Notes 5 and 8

- PN 5 provides generic conventions and writing style – intended to have a longer life than for the draft LPSs
- PN 8 – very specific guidance on drafting and format of the written part of the draft LPS
- Relevant to the drafting of transitioning and new PPZs, SAPs, SSQs and code-applying provisions

Key challenge in drafting an LPS - exercise of discretion

Section 57 of the Act

Clause 6.10 of the SPPs

Be disciplined about what is relevant to the decision making exercise

6.10 Determining Applications

6.10.1 In determining an application for any permit for use or development the planning authority must, in addition to the matters required by section 51(2) of the Act, take into consideration:

- (a) all applicable standards and requirements in this planning scheme; and
- (b) any representations received pursuant to and in conformity with section 57(5) of the Act,

but in the case of the exercise of discretion, only insofar as each such matter is relevant to the particular discretion being exercised.

6.10.2 In determining an application for a permit for a Discretionary use the planning authority must, in addition to the matters referred to in sub-clause 6.10.1 of this planning scheme, have regard to:

- (a) the purpose of the applicable zone;
- (b) any relevant local area objective for the applicable zone;
- (c) the purpose of any applicable code;
- (d) the purpose of any applicable specific area plan; and
- (e) the requirements of any site-specific qualification,

but in the case of the exercise of discretion, only insofar as each such matter is relevant to the particular discretion being exercised.

Key challenge in drafting an LPS - exercise of discretion cont.

Particular provisions in the SPPs that allow an exercise of discretion to be mindful of:

- 7.1.3 – existing non-conforming uses
- 7.4.3 – determining application for change of use to a heritage place
- 7.6.1 – access and provision of infrastructure over a different zone
- 7.10.3 – development not required to be categorised into a use class

P1

The arrangement and construction of roads within a subdivision must provide an appropriate level of access, connectivity, safety and convenience for vehicles, pedestrians and cyclists, having regard to:

- (a) any road network plan adopted by the council;
- (b) the existing and proposed road hierarchy;
- (c) the need for connecting roads and pedestrian and cycling paths, to common boundaries with adjoining land, to facilitate future subdivision potential;
- (d) maximising connectivity with the surrounding road, pedestrian, cycling and public transport networks;
- (e) minimising the travel distance between key destinations such as shops and services and public transport routes;
- (f) access to public transport;
- (g) the efficient and safe movement of pedestrians, cyclists and public transport;
- (h) the need to provide bicycle infrastructure on new arterial and collector roads in accordance with the *Guide to Road Design Part 6A: Pedestrian and Cyclist Paths 2009*;
- (i) the topography of the site; and
- (j) the future subdivision potential of any balance lots on adjoining or adjacent land.

19.4.3 Landscaping

Objective:	That landscaping enhances the amenity and appearance of the streetscape where buildings are setback from the frontage.	
A1	<p>If a building is set back from a road, landscaping treatment must be provided along the frontage of the site:</p> <ul style="list-style-type: none">(a) to a depth of not less than 6m; or(b) not less than the frontage of an existing building if it is a lesser distance.	P1 <p>If a building is setback from a road, landscaping treatment must be provided along the frontage of the site, having regard to:</p> <ul style="list-style-type: none">(a) the width of the setback;(b) the width of the frontage;(c) the topography of the site;(d) existing vegetation on the site;(e) the location, type and growth of the proposed vegetation; and(f) any relevant local area objectives contained within the relevant Local Provisions Schedule.

Language clarity and consistency

Important to use:

- ordinary language by reference to the Macquarie dictionary
- same language that is in the SPPs
- language that has an established legal interpretation

Helps the PA to make the decision and for the parties to the process to understand what is required of them (applicants, community, planning professionals, Tribunal, Supreme Court)

Specific drafting issues

Drafting PPZs and SAPs - purpose statements

- Practice Note 8 - section 4.0
 - should be:
 - different in scope and intent to SPP zone and code purposes
 - drafted clearly and concisely to reflect intent and function of PPZ or SAP
 - important to establish the scope and range of uses in use tables, scope of use standards and development standards

Drafting PPZs and SAPs – use tables

- Practice Note 8 - section 4.5
 - required for PPZ, not required, but can be included in a SAP
 - use qualifications to be drafted so it is clear:
 - the result of not meeting the qualification;
 - the form a use or development may take; and
 - the circumstances a use or development is NPR, P, D or Prohibited.
 - a use class may have more than one qualification
 - qualifications must not include matters more appropriate for standards, particularly development standards
 - use qualifications in a PPZ or SAP may be confined to areas covered by a LAO which may be part of a PPZ or SAP
 - a qualification in an transitioning PPZ or SAP may need to be redrafted to be consistent with the conventions in the SPPs

XX.2 Use Table

Use Class	Qualification
No Permit Required	
Passive Recreation	
Residential	If for home-based business.
Permitted	
Residential	IF: (a) located above ground floor level (excluding pedestrian or vehicular access); and (b) not listed as No Permit Required.
Sports and Recreation	If located above ground floor level (excluding pedestrian or vehicular access).
Tourist Operation	
Visitor Accommodation	IF: (a) located above ground floor level (excluding pedestrian or vehicular access); and (b) not a camping and caravan park or overnight camping area.
Discretionary	
Custodial Facility	If for a remand centre.
Hospital Services	
Manufacturing and Processing	If for alterations or extensions to existing Manufacturing and Processing.
Residential	If not listed as No Permit Required or Permitted.
Sports and Recreation	If not listed as Permitted.
Storage	If not for a liquid, solid or gas fuel depot.
Transport Depot and Distribution	If for a public transport facility.
Visitor Accommodation	IF: (a) not a camping and caravan park or overnight camping area; or (b) not listed as Permitted.
Prohibited	
All other uses	

8.3.2 Visitor Accommodation



Objective:	That Visitor Accommodation: (a) is of a scale that is compatible with the character and use of the area; (b) does not cause an unreasonable loss of privacy; and (c) does not impact the safety and efficiency of local roads or rights of way	
Acceptable Solutions		Performance Criteria
A1 Visitor Accommodation: (a) guests are accommodated in existing buildings; and (b) <u>has</u> a gross floor area of not more than 160m ² .		P1 Visitor Accommodation must: (a) not cause an unreasonable loss of privacy to adjoining properties; (b) be of a scale that respects the character and use of the area; (c) not adversely impact the safety and efficiency of the local road network; and (d) <u>not</u> unreasonably disadvantage owners and users of rights of way.



Drafting PPZs and SAPs - LAOs

- 'May' be included in PPZs and SAPs (LP 1.3.1)
- Practice Note 8 - section 3.0
 - Purpose and intent must be drafted in clear and precise language
 - Must be consistent with the purpose of the PPZ or SAP
 - Set out the planning objectives and outcomes for particular localities and state the planning outcomes sought to be achieved
 - Use introductory words such as 'to provide', 'to encourage', 'to achieve'.
 - Statements specifying mandatory outcomes are to be avoided eg not 'must' or 'ensure'

Drafting PPZs and SAPs - standards

- Practice Note 8 - section 4.6
 - The statement of the objective is the standard that must be met
 - The objective must be consistent with the purpose statement, and be concise and clear
 - An AS or the PC specify alternative ways of meeting the standard
 - An objective must not include matters for which no AS or PC is provided

Drafting PPZs and SAPs – Acceptable Solutions

- Practice Note 8 - section 4.6
 - are one way of meeting the objective in the standard
 - must be quantitative, clear and measurable
 - an AS must not rely on exercise of judgment to determine compliance with a standard with the exception where the decision maker is:
 - a person is a statutory office holder with responsibility for the making of the decision; or
 - a person accredited is an accredited person as defined in the Act (s3)

Drafting PPZs and SAPs – Performance Criteria

- Practice Note 8 - section 4.6
 - should not be written as alternatives to ASs
 - a PC should confirm the objective to be met – restated in the leading sentence
 - a PC should list the matter to which regard must be had when a planning authority is exercising its discretion – use ‘having regard to’/‘must demonstrate’ tests for PCs (not - must satisfy, take into consideration, take into account)
 - number of matters to which regard should be had, should be relevant, focussed and as limited as the circumstances permit

P4

A use listed as Discretionary must not cause an unreasonable loss of amenity to adjacent sensitive uses, having regard to:

- (a) the intensity and scale of the use;
- (b) the emissions generated by the use;
- (c) the type and intensity of traffic generated by the use;
- (d) the impact on the character of the area; and
- (e) the need for the use in that location.

P2

A window or glazed door to a habitable room of a dwelling that has a floor level more than 1m above existing ground level, must be screened, or otherwise located or designed, to minimise direct views to:

- (a) a window or glazed door, to a habitable room of another dwelling; and
- (b) the private open space of another dwelling.

judgement



Drafting PPZs, SAPs & SSQs - transitioning

- May make changes [schedule 6 clause 8C(3)]
 - conform to requirements of the SPPs;
 - reflect terminology of the SPPs;
 - make correct references to relevant provisions (LPSs and SPPs);
 - achieve the effect intended of the relevant provisions.

Drafting PPZs, SAPs & SSQs - new

- Need to meet the requirements of section 32(4) of the Act –
‘significance’ (18 tests) and ‘particular qualities requiring unique provisions’ (4 tests)

Drafting SAPs & SSQs

- Specify if the SSQ or a SAP provision is in modification, substitution or addition to a specific SPP provision
- SSQs and SAPs must be clear on the provision or part of provision it is in addition to
- SSQs must specify the Use Classes and status of each use
- SAP use tables are in substitution to the zone use tables and the whole use table must be reproduced.

XXX - Site-specific Qualifications

Reference Number	Site reference	Folio of the Register	Description (modification, substitution or addition)	Relevant Clause in State Planning Provisions
XXX-8.1	25 Smith Street, Jonestown	12345/6	A modification to the qualification for the Discretionary Use Class of Business and Professional Services for this site is: delete "consulting room"	General Residential Zone – clause 8.2 Use Table
XXX-8.2	35-37 West Church Street, Stevensville	162428/1	Additional Permitted Use Classes for this site are: (a) Education and Occasional Care; and (b) Emergency Services.	General Residential Zone – clause 8.2 Use Table
XXX-10.1	Charles Street, Ramsay	207014/7	A substitution to Acceptable Solution A1 for this site is: "Multiple dwellings must have a site area per dwelling of not less than 2,500m²."	Low Density Residential Zone – clause 10.4.1
XXX – 13.1	<u>Howlett Road</u> , Young Town	<List all titles>	An additional qualification for the Permitted Use Class Food Services for this site is: "If not for take away food premises unless in a building specifically designed and built for commercial purposes prior to 22 November 1999."	Urban Mixed Use Zone - clause 13.2 Use Table
XXX-15.4	Alomes Way, Lucas Heights	987654/1	An additional Acceptable Solution and Performance Criterion for this site is: A3 Development on land is limited to an extension of the existing shopping complex building and has a gross floor area no greater than 1000m². P3 No Performance Criterion.	General Business Zone – clause 15.4.3 Design
XXX-28.10	Speedway, Hogue Street, Pleasantville	150110/1	An additional Permitted Use Class for this site is: Motor Racing Facility with the qualification "If for extensions and alterations to existing buildings."	Recreation Zone - clause 28.2 Use Table

Drafting SSQs – example table

Drafting code lists

- Transitioning - may make changes [schedule 6 clause 8D(8)]
 - correct cross referencing
 - correct minor errors
 - ensure effective operation of the provision
- Practice Note 8 – section 7.4 and 7.5
- the rules are different for how to populate the tables depending if it is a new list or transitioning – especially for heritage lists

Applied, adopted or incorporated documents

- Practice Note 8 – section 8.0
- Might be best to include specific provision to create certainty – reference to a whole standard or code will invoke wide discretion

Language, defined terms and words in common usage

- Practice Note 5
- In PPZ and SAP must:
 - be additional to those in clause 3 of SPPs;
 - not change the meaning of an existing defined terms (LP 1.4.3 & 1.5.3)
- Always use the defined term in the SPPs Table 3.1
- Use SPP definitions or ordinary meaning wherever possible
- Acceptable to rely on dictionary meaning of words in common usage (PN 5)
- Macquarie dictionary is the preferred reference for the ordinary meaning (PN 5)

Drafting review tests

- Is there superfluous language – words or phrases?
- Does the language lead to vague or uncertain outcomes, either quantitative or qualitative?
- Are there words that don't add to the meaning and purpose of a statement?
- Are there words that confuse or complicate meaning and purpose?
- Is the purpose of any qualifying words clear?
- Have different words or phrases been used to mean essentially the same thing?
- Have you checked the SPPs to see if a similar word or phrase is used?

Drafting review tests cont.

- Are the words used to establish spatial relationships clear and used consistently?
- Are the words or phrases used to determine the qualitative judgement required in the exercise of a discretion clear and used consistently?
- Have the words used been checked to ensure that their intended meaning is consistent with the meaning of the word as determined by the Macquarie Dictionary?
- Where a word or phrase is to be defined to have a particular meaning for the purposes of a PPZ or SAP, is the definition clear and unambiguous.

Drafting consistency tests

- Where standards are common to SPPs, PPZs or SAPs, is the drafting identical?
- Where the drafting of the common standards is different, are the differences based on a planning policy objective which is necessitated by the different PPZ or SAP purpose, local area objective or the objective?

Editorial

- Important to do a QA
- Check carefully grammar and expression rules (PN5)
 - Punctuation – some specific words capitalised eg Acceptable Solution, Performance Criteria, Use Table, Permitted, Discretionary, Prohibited
 - Follow the Act – hyphens is an example
 - Use must (and may) not shall or will
 - Remove 'to ensure' from transitioning provisions
 - Check numbering hierarchy
 - Singular preferred to plural

Further information

TPC website	www.tpc.tas.gov.au
PPU website	planningreform.tas.gov.au
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